Supreme Court, U. S.
FILED
MAY 23 1975
MICHAEL RODAK, JR., CLERK

THE SUPREME COURT

OF THE

UNITED STATES

Donald H. Stephens
Appellant
v
L. D. Howle
Appellee

Case No. 74-1475

JURISDICTIONAL STATEMENT

on appeal from the judgment of the Court of Appeals of Georgia in case no. 49894, Stephens V. Howle, 133 Ga. Appeals 584, 211 SE 2nd 637

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PREFACE

Attention is called to the misstatement in the Court of Appeals's decision of the charge complained of. The record shows the charge complained of was "Ladies and gentlemen, the burden of proof is on the plaintiff in this case to establish to your responsible satisfaction by a legal proponderance of the evidence that the charges which he, the plaintiff, makes are true, except such charges or allegations as may be admitted by the defendant to be true." (T 50, R 38)The decision makes no sence unless the charge complained of is considered.

The record of the Court of Appeals was sent to this court without notice to or review by appellant. Thus he is unfamiliar with the numbering system used. Appellant will refer to the record using the following method; (R 38) "R" followed by a number refers to the page of the record as numbered by the trail court. "T" followed by a number refers to the page of the trail transcript. Other documents are referred to by name and page number.

A former decision, Stephens v Howle, 132 Ga. Ap. 92, 207 SE2nd 632, of the Court of Appeals in this case is attached. The decision is immaterial to the appeal except to show the degree of legal technicality used against appellant.

Appellant is not an attorney and apologizes for his technical mistakes.

Parentheses are used to state material which may not be strickly relevant or reflected by the record but are added to explain why the events happened.

OPINION BELOW

The opinion appealed from is reported as Stephens v Howle, 133 Ga. Ap. 584, 211 SE2nd 637. A prior decision is reported as Stephens v Howle, 132 Ga. Ap. 92, 207 SE2nd 632.

JURISDICTION

This appeal is taken pursuant to 28 U.S.C. 1257 (2). There is also federal questions raised pursuant to 28 USC 1257 (3).

Appellant sued appellee for false imprisonment. Under state law, where an arrest is made without a warrant, the arresting officer must plead and prove that a crime was committed in his presence by the arrested person. The trial judge charged: The burden of proof was upon plaintiff. Plaintiff appealed. Appellee argued in his reply brief that the evidence was sufficient to prove that appellant committed a crime. The statutes involved were Ga. Code Anno. 26-2610 (abusive language) and City of Atlanta ordinance 20-7(a) (disorderly conduct.). The Court of Appeals agreed with appellee and substained the judgment of the trial court on Dec. 5, 1974. Appellant moved for reconsideration upon the grounds that the above statutes as consturcted by said decision was unconstitutional because it violated constitutional protected speach and because of vagueness. The motion was denied on Dec. 18, 1974. Appellant's application for certiorari was denied on Jan. 29, 1974, by the Supreme Court of Georgia. Remittitur was transmitted to the Court of Appeals on or after Feb. 11, 1975. The notice of appeal was filed in the Court of Appeals of Georgia on Feb. 13, 1975.

Ga. Code Anno. 26-2610 (a) states: "A person who commits any of the following acts is guilty of a misdeameanor: (a) Without provocation, uses to or of another, either in his presence or by telephone, opprobrious words or abusive language, tending to cause a breach of the peace; or (b) . . . " The alleged statement made by appellant was "it wasn't my G..da... business being where I was and he wan't going to answer any more questions." (T22) (The above statute have been amended but the statute as stated above was in effect at the time of the arrest.)

City of Atlanta ordinance 20-7(a) states: "It shall be unlawful for any person within the corporate limits of the City of Atlanta to violate any of the following subsections of this section: (a) Any person who shall act in a violent or tumultuous manner toward another whereby any person is placed in fear of safety of his life, limb or health; or (b) . . ." The only testimony in this respect was the subjective (no specific acts were alleged) judgment of appellee, the arresting officer, that appellant acted in a boisterous and tumultuous (not violent) manner.

The unconstitutional construction of abusive language statutes are appealable. See Gooding v Wilson 405 US 518, 31 LEd2nd 408, 92 SCt 1103. A city ordinance is a "statute" within the meaning of 28 USC 1257(2). See Jamison v State of Texas, 318 US 413, 87 LEd 869, 62 SCt669.

There is also a federal question involving the conflicting concurrent jurisdiction between a federal and state court. This question is reviewable under 28 USC 1257(3).

Appellant filed his suit in state court. However jurisdiction was not proper because service was perfected improperly. (R 32) Appellant then refiled and properly served his suit in federal court (under the civil rights act.) Appellant invoked the **pendent** jurisdiction of the federal court in relation to the state claim. Does the jurisdiction of the state claim vest with the federal or state court?

Appellant obtained judgment in federal court against appellee. Said judgment was set aside because of the res judicata effect of the state judgment and judgment was then entered for appellee. This deprived appellant of redress for the violation of his constitutional rights. The state procedural rules and methods have been so arbitrarily applied and used that appellant could not have had the technical ability or proper notice to protect his federal rights. In Henry v Mississippi, 379 US 443, 85 SCt 564, 13 LEd2nd 408, it was held. "Accordingly, we have consisistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."

QUESTIONS PRESENTED

Where Ga. Code Anno. 26-2610 (abusive language) is constructed to make speaking the words "it was none of my G.. d.. business" a crime, is said statute constitutional or does it violate the first amendment to the Constitutuion of the United States?

Where the allegation is that one acted in a boisterous and tumultuous manner (there being no specific acts alleged nor no violence alleged), and the City of Atlanta ordinance 20-7 is constructed to make the alleged act a crime; is said ordinance unconstitutional because of vaqueness and violation of constitutionally protected speach?

Where a complaint is filed in state court, but jurisdiction is not proper because service is perfected improperly, and the suit is refiled and properly served in federal court, and the **pendent** jurisdiction of the federal court is invoked with respect to the state claim; does the federal court have jurisdiction of the state claim, or can the state court acquire jurisdiction adverse to the federal jurisdiction ?

Can the arbitrary and erronuous application of state procedural rules be used to deprive one of redress o' his constitutional rights?

STATEMENT OF CASE

A. WITH RESPECT TO UNCONSTITUTIONAL STATUES

Appellee Howle without a warrant arrested appellant Stephens at his apartment and charged him with simple assault and creating a turmoil. (T 4)

The alleged assault was not committed in the presence (T 33) of appellee. (Appellant denied that he committed any assault.T 4)

There is no state law or city ordinance of creating a turmoil.

The charges were dismissed for want of prosecution. (Appellee did not appear at the trial.) (T 9)

Appellant Stephens filed suit for false imprisonment. (R 5)

In interrogatories no. 26, 40, 51, and 52 to appellee, appellant inquired as to any law, ordiance, or rule authorizing, or tending to authorize or ratify the arrest of appellant Stephens (including the official citation, the enacting body, and the date of enactment). (R 17, 20 & 21)

The least evasive answer of appellee Howle was "Law against creating a turmoil and a law against simple assault; further, information requested in interogatorry no. 52 is a matter of public record and is objected to on that ground; further defendant is not currently in possesion of the information. (R 31)

In interrogatory no. 25 appellant asked, "Was the loudness level of plaintiff's part of the conversation before his arrest over 63 decibels? (R 17)

Appellee answered, ". . . Further answering defendant does not know." (R 28)

On the day of trial in open court, appellee Howle amended his answer to add as an affirmative defense, the following:

AMENDED ANSWER

comes now the defendant, L. D. Howle, and amends his Answer to add, as an affirmative defense the following:

SEVENTH DEFENSE

The arrest of Donald H. Stephens was made because of crimes committed by Donald H. Stephens in the presence of the defendant, who was at the time a police officer of the City of Atlanta acting in his official capacity as such." (R 34)

Ga. Code Anno. 105 - 1801 states, "In every case of tort, if defendant was authorized by law to do the act complained of, he may plead the same as justification; by such plea he admits the act to be done, and shall be entitled to all the privileges of one holding the affirmative of the issues but such plea shall not give the defendant the right to open and conclude the argument before the jury, unless it shall be filed before the plaintiff submits any evidence to the jury trying the case."

Under Ga. law, where an arrest is made without a warrant, burden is on defendant to **plead** and **prove** that a criminal offense was committed by plaintiff in the presence of defendant making the arrest. Savannah Electric Co. v Love, 27 Ga. Ap. 350 (2), 108 SE 313

Appellee Howle did not plead any specific crimes committed by appellant in appellee's presence, nor did he supply the information in response to interrogatories.

However appellee testified at the trial, "It was a State disorderly conduct charge and City Ordinance, violation of the noise ordinance, and creating a turmo'l, and abusive language." (T 26) Appellant objected upon the ground that this was not the best evidence. Did the judge substain the objection? He stated, "I will let the defendant state what occurred as far as he knows and let the jury draw its own conclusion." (T 26)

There is no State disorderly conduct statute.

There is no law or ordinance of creating a turmoil.

There was no noise ordinance introduced in the evidence. (City ordinances are not judicially noticed under Ga. law.)

Appellee testified that appellant used the following words: "it wasn't my G-d... business and I didn't have any business being where I was and he wasn't going to answer any more questions." (T 22) (Appellant Stephens denied he used any curse words. T 47)

Appellee Howle testified that appellant "acted in a boisterous and tumultuous manner". (T 26) No specific acts of appellant were alleged in support of the above conclusion. There were no allegations that appellant Stephens acted in a violent manner. The evidence shows no acts on appellant's part which does not involve freedom of speach. (Appellant testimony was that he was arrested merely because he declined to answer further questions after being accured of committing an assault. T 4)

Appellant was given opening and closing argument without objection from appellee.

The trial judge charged the jury, "Ladies and gentlemen, the burden of proof is on the plaintiff in this case to establish to your reasonable satisfaction by a legal preponderance of the evidence that the charges which he, the plaintiff, makes are true, except such charges or allegations as may be admitted by the defendant to be true." (T 50)

Appellant objected to the charge. (Appellant's recollection of his objection was, "I object to the charge. I showed a prima facie case and you charged 'The burden of proof was upon the plaintiff.'; defendant had to show I committed a crime.") (T 56) However the transcript states the objection as, "I object to the charge. I showed a prima facie case and the burden of proof was upon the plaintiff (sic) to show I committed a crime." Appellee's attorney argued tha' appellant waivered his objection. He stated, ". . . . If that were the case then I would have been entitled to open and close and he took that advantage supposedly knowing that fact." (T 56)

It was technically impossible for appellant, a layman, to state the erroneous charge verbatim and the objection was as definite as the circumstances permitted. The trial judge knew the erroneous charge was with respect to who had shown a prima facie case; he could have corrected the error by further charging the jury that plaintiff had shown a prima facie case and the defendant had to show that plaintiff committed a crime. He did not do this, and the case went to the jury.

The jury returned a verdict for defendant in which they commented, "We would further caution the defendant to exercise restraint in further arrests in questionable situations." (T 57-58) If the situation was questionable then the jury did not believe that appellee proved his defense of justification; that appellant had committed a crime.

Appellant appealed.

On appeal, appellee Howle argued in his reply brief, page 4, that he introduced sufficient evidence to prove his defense, and the charge was correct. He stated, "In this case, Appellee assumed any burden placed upon him, meeting and rebutting any prima facie case made by Appellant or allowed to Appellant."

The Court of Appeals held: "The instruction as given was correct. The plaintiff was not interested in establishing the **defense** of justification, and the instruction did not place any

burden on the plaintiff which the law does not already require: That is, if the defendant offered evidence of justification, to rebut such evidence by a preponderance of proof in order to win his case." If the charge was correct, the court must, of necessity, have determined that appellee introduced evidence sufficient to prove that appellant committed a crime.

Appellant moved for reconsideration and applied for certiorari to the Supreme Court of Georgia upon the ground that Ga. Code Anno. 26-2610 (abusive language) and City of Atlanta ordinance 20-7(a) (as constructed by the Court of Appeals in its decision) was unconstitutional. Both motion and application were denied.

Since the allegation of what crimes appellant had committed was under the unique control of appellee, and since he did not plead the above statute and ordinance, nor did he supply this information in response to interrogatories; appellant did not have sufficient notice in order to raise the issues in the trial court. Furthermore, the statute and ordinance were not unconstitutionally constructed untill the Court of Appeals rendered its decision. Thus, the only recourse available to appellant was to raise the issue by motion for reconsideration.

B. STATEMENT OF CASE WITH RESPECT TO CONFLICTING JURISDICTION

On Sept. 13, 1972, Appellant Stephens sued and instructed the sheriff to serve L. D. Howle of 3180 Spring Street, Red Oak, Ga. (R 9)

The record shows a Larry Howle (not appellee Lindley Douglas Howle) lives at this address. (R 54 column 2 33rd name) (At this time appellant believe him to be the person who made the false arrest.)

On Oct. 13, 1973 appellee, Lindley Douglas Howle (not original defendant) filed an answer with reservations as to the court's jurisdiction. (R 10, R 24) It stated, "SECOND DEFENSE; The court lacks jurisdiction over the person of the defendant . . ." "THIRD DEFENSE: Venue in this Court is improper . . " "FOURTH DEFENSE: Process in this action is insufficient . . ." "FIFTH DEFENSE: Service of Process in this action is insufficient . . ." "SIXTH DEFENSE: Further answering the complaint, though denying that he is subject to the jurisdiction of this Court, . . ." Pursuant to Ga. Code Anno. 81A-112(b) (same as FRCP 12b), a defendant can defend upon the merits of the case without waivering jurisdiction. Appellee's attorney signed the answer (R 12); he must have believed there were good grounds to support the answer.

On Oct. 21, 1972, L.D. Howle of Red Oak, Ga. (not appellee) was served with the complaint. (R 9)

In interrogatory no. 59 (a & d) appellant asked the factural basics of appellee defenses "The court lacks jurisdiction over the person of defendant . . . " and "Service of process in this action is insufficient . . . " (R 22)

On Oct. 17, 1973 (one year after the improper service), appellee answered: 59a "Jurisdiction is not proper where service is not proper." 59d "Service was perfected improperly." (R 32)

(Although appellant did not know at this time the exact reason for the improper service,) in reliance on the above sworn statement of appellee and to appellant's injury, appellant refiled his complaint in federal court (under the civil rights act) and invoked the **pendent** jurisdiction of the federal court in relation to the state claim. (R 46 paragraph 1 & counts 2 & 5)

The federal complaint was served upon Lindley Douglas Howle, not the original defendant in the state suit but the correct defendant in the federal suit, on Jan. 9, 1774. (R 45)

The state case was scheduled for trial on Jan. 8, 1974, (T 1) 12 days after the statute of limitation had expired. (R 5) (Appellant had no actural notice of this untill he read the local legal paper the night before trial. He attempted to dismiss the complaint but was not allowed to do so.) (R 43)

A general verdict was returned for defendant, and appellant moved for a new trial.

Under Ga. law a hearing for a new trail is a separate legal proceeding requiring personal service. Ga. Code Anno. 70-306, Dunn v Dunn, 221 Ga. R. 368, 144 SE2nd 758

Personal service was perfected on appellee (not original defendant). in the new trial proceeding. R 37, R 24)

As a part of this proceeding, appellant moved by amendment to set aside the judgment upon the grounds that the state court lacked subject-matter jurisdiction because it was preempted by the federal court and that appellee was estopped from asserting the state court had jurisdiction. (R 40)

Under Georgia law "admissions upon which other parties have acted, either to their own injury or the benefit of the persons making the admissions" are estoppels. Ga. Code Anno. 38-114

Ga. Code Anno. 37-109 states: The equity of a party who has been mislead is superior to that of him who willfully misleads him."

(Judgment was obtained against appellee Howle in the federal suit. The judgment was subsequently set aside and judgment entered for appellee primarily because of the res judicata effect of the state judgment. However if the state judgment, is reversed, appellant has adequate remedy under rule 60(b5) of the federal rules of civil procedure (reversal of prior judgment)).

SUMMARY OF ARGUMENT

A. UNCONSTITUTIONAL STATUES

First. a misstatement is noted in the decision of the Court of Appeals.

Although appellant was arrested for simple assault and creating a turmoil, on appeal the issue had charged to whether or not appellant violated Georgia abusive language law 26-2610(a) and City of Atlanta disorderly conduct ordinance 20-7(a).

In Gooding v Wilson, 405 US 518, this court held Georgia's abusive language law unconstitutional because it had not been constructed to limit its application to "fighting words". The only abusive language alleged to have been used by appellant was "G-d." The Court of Appeals, in effect, constructed a new abusive language law as making the above act a crime. This is in conflict with the holding in Gooding v Wilson, and this court should declare this law unconstitutional.

The evidence shows only the subjective judgment of appellee that appellant "acted in a boisterous and tumultuous manner". In Hunter v Allen, 422 F2nd 1158, the court said that City of Atlanta Ordinance 20-7(a) was constitutional only if it was constructed to limit its application to violent acts. There was no violent acts alleged to have been committed by appellant. The Court of Appeals, in effect, constructed the ordinance to make the alleged act a crime. This ordinance is thus unconstitutional, and this court should so declare. The decision of the Court of Appeals was dependant upon the assertion that appellee introduced evidence sufficient to prove appellant committed a crime, and therefore should be reversed.

B. CONFLICTING JURISDICTION

Appellant sued and served the wrong party in his state suit. Appellee, Lindley Douglas Howle, (not original defendant) appeared only with reservation as to the court jurisdiction.

By appellee's own admission under oath on Oct. 17, 1973, jurisdiction and service was improper in the state case.

In reliance on this and to his injury, appellant sued and served appellee (not original defendant in the state suit) on Dec. 17, 1973 in federal court and invoked the **pendent** jurisdiction of the federal court in respect to the state claim. Where a complaint is filed and service is perfected the court acquires jurisdiction as of the date of filing the complaint. The federal court acquired jurisdiction of the state claim on Dec. 17, 1973, and the state court did not have jurisdiction, at this time. The state can not subsequently acquire jurisdiction, and defeat appellant's rights in the federal suit.

ARGUMENT

A. WITH RESPECT TO UNCONSTITUTIONAL STATUTES

The charge complained of was misstated by the Court of Appeals in its decision. The charge complained of was: "Ladies and gentlemen, the burden of proof is on the plaintiff in this case to establish to your reasonable satisfaction by a legal preponderance of the evidence that the charges which he, the plaintiff, makes are true, except such charges or allegations as may be admitted by the defendant to be true." Although appellant did not state the full sentence of the charge complained of in the enumeration of errors, he did further identify the charge by stating: "2A The court erred in not granting a new trial upon the above ground, error two." He did state the charge in full in his statement of facts of his appeal brief, page 1, and supported it by reference to the record. The record clearly shows the above stated charge was the charge complained of. This charge was stated in full in the admendment to the motion for a new trial. (R 38) The Court of appeal have no authority to misstate the charge. Ga. Code Anno. 6-809(d) States: **"Where it is Apparent** from the notice of appeal, **the record**, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or **what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding** that the notice of appeal fails to specify definitely the judgment appealed from or **that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed.**" The decision makes no sense unless the charge complained of is considered; the issue of damages is immaterial to a favorable verdict.

BEST COPY AVAILABLE

Although appellant was arrested for simple assault and creating a turmoil, on appeal the issue had changed to whether or not appellant violated Ga. Code Anno. 26-2610(a) and City of Atlanta ordinance 20-7(a)

Whether or not the alleged assault occured is immaterial in this case since it did not occur in appellee's presence. (T 33) In Georgia a policeman has no authority to make an arrest for a misdemeanor without a warrant unless the crime occurred in the arresting officer presence. However appellant denied he commited any assault. (T 4)

Appellee Howle testified over objection that the crimes alleged to have been committed in his presence was: "It was a State disorderly conduct charge and City Ordinance, violation of the noise ordinance, and creating a turmoil, and abusive language." (T 26)

There is no "State disorderly conduct" statute.

There is no law or ordinance of "creating a turmoil".

There was no noise ordinance introduced in the evidence. City ordinances are not judicially noticed under Georgia law. Furthermore the evidence was not sufficient definite to prove the violation of any noise ordinance. In reply to interrogatory no. 25 appellee testifies that he did not know if the loudness level of the conversation was over 63 decibels. (R 17, R 28)

The remaining alleged crimes are abusive language and city disorderly conduct charge. Since the Court of Appeals, in effect, determined that sufficient evidence was introduced to prove that appellant committed a crime, the issue is whether or not this construction of the above statute and ordinance is constitutional.

The abusive language statute in effect at the time of the arrest of appellant was Ga. Code Anno. 26-2610(a) (Acts 1968, pp. 1249, 1316) "A person who commits any of the following acts is guilty of a misdemeanor: (a) Without provocation, uses to or of another, either in his presence or by telephone opprobrious words or abusive language, tending to cause a breach of the peace; or (b) . . ." (it is immaterial but this law have since been amended.) This replaced former Ga. Code Anno. section 26-6303 which states: "Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or . . . shall be guilty of a misdemeanor."

In Gooding v Wilson, 405 US 518 p 525, 31 LEd2nd 408 p416, 92 SCt 1103, this court declared Ga. Code Anno. 26-6303 unconstitutional because it was not constructed to limit the words used to "fighting words". Said holding was emphatically reaffirmed in Lewis v City of New Orleans, 415 US 130, 39 LEd2nd 214, 94 SCt 970. In Gooding v Wilson, this court cited Georgia cases holding the word "G..d..." as abusive and said thiswasan unconstitutional construction of said law. The only curse word alleged to have been said was "G..d...." The alleged statement was: "it wasn't my G..d... business and I didn't have any business being where I was and he wasn't going to answer any more questions." (T 22)

Thus the construction of Georgia's abusive language law by the Court of Appeals making the alleged statement of appellant a crime is unconstitutional. Therefore this court should declare Ga. Code Anno. 26-2610(a) (Acts 1968, pp. 1249, 1316) unconstitutional.

The City of Atlanta ordinance, section 20-7(a) have been unconstitutionally constructed. The constitutionality of said ordinance was tested in Hunter v Allen, 422 F2nd 1158. Some of the sections of said ordinance was held unconstitutional on their face. The sections of said ordinance held not unconstitutional on their face are listed on page 1160 of said case. The only section of said ordinance remotely related to the acts alleged to have been committed by appellant Stephens is section (a). Section (a) states: "(a) Any person who shall act in a violent or tumultuous manner toward another whereby any person is placed in fear of safety of his life, limb or health; or (b) . . ." This section was substained by a divided court pages 1163-1166 of said case. The minority opinion held that this section was unconstitutional on its face because of vagueness and overbroadness.

The majority opinion was that the word "tumultuous" was too vague and cited cases in support of this, and that this section was constitutional only if it was constructed to limit its application to violent acts. There is no allegation in the evidence that any acts of appellant was violent. The allegation was that appellant "acted in a boisterous and tumultuous manner." (T 26) Furthermore the evidence shows no specific act of appellant from which a reasonable person would infer that anyone was placed in fear of safety of his life, limb, or health. The allegation was the mere subjective judgment of the arresting officer. Laws dependent upon the mere subjective judgment of the arresting

officer are unconstitutional. See Coates v City of Cincinnati, 402 US 611, 29 LEd2nd 211, 91 SCt 1686 p1688 hn. 2. Hunter v Allen, 422 F2nd 1158 was reversed on unrelated grounds. by this court. Embey v Allen (same case) 401 US 989, 28 LEd2nd 528, 91 SCt 1237. The ordinance have now been constructed by the Court of Appeals. Said construction violates constitutionally protected speach and is unconstitutional because of vagueness and overbroadness. Therefore this court should now decide the issue.

CONCLUSION

Since the Court of Appeals unconstitutionally constructed Ga. Code anno. 26-2610 and City of Atlanta ordinance 20-7 as sufficient in the factual situation to prove that appellant committed a crime, the judgment should be reversed and a new trial granted. (for purpose of consolidation with the federal claim)

B. ARGUMENT WITH RESPECT TO CONFLICTING JURISDICTION

By mistake, appellant sued and caused the sheriff to serve Larry Howle of Red Oak, Ga. (R 9, R 54)

However appellee, Lindley Douglas Howle of College Park, Ga., answered the complaint with reservations to the court's jurisdiction. He stated in his answer: "SECOND DEFENSE: The cour lacks jurisdiction over the person of the defendant . . . THIRD DEFENSE: Venue in this court is improper . . . FOURTH DEFENSE: Process in this action is insufficient . . . FIFTH DEFENSE: Service of Process in this action is insufficient . . . SIXTH DEFENSE: Further answering the complaint, though denying that he is subject to the jurisdiction of this Court . . ." This is proper under Ga. Code Anno. 81A-112 (b) (same as FRCP 12b). See Vilter Mfg. Co. v Rolaff, 110 F2nd 491. (R 10, R 24)

Although appellant had the option of amending his complaint and changing the parties (if he had sufficient knowledge of the facts), he was under no obligation to accept a change of parties.

In answer to interrogatory no. 59 a & d appellee stated under oath: "Jurisdiction is not proper where service is not proper. Service was perfected improperly." (R 22, R 32) Since this information was peculiarly within the knowledge or control of appellee (He knew if he was properly served or was the party served.), appellee had a duty (when asked on interrogatories) to make full disclosure of all material facts; said information is constructed most strongly against appellee and in appellant's favor.

In reliance on appellee's statement (although appellant did not know the reason for the improper service), He refiled his complaint in federal court under the civil rights act, and invoked the **pendent** jurisdiction of the federal court with respect to the state claim. (R 46 paragraph 1 & count 2 & 5) Appellant sued, and service was perfected upon Lindley Douglas Howle in the federal case. R 45, 46).

The federal complaint was filed on Dec. 17, 1973 (R 46) and served on Jan. 9, 1974. (R 45) (two previous attempts had been made R45) Did the federal court acquire jurisdiction on the date of filing the complaint or on the date of service? This question is critical. The statute of limitation expired on Dec. 27, 1973. If the federal court did not acquire jurisdiction untill Jan. 9, 1974, the date of service, then the statute of limitation had expired and the court lacked jurisdiction. This question have been answered consistencily in numerous cases. See Parker v Kilgo, 109 Ga. Ap. 698 syllabus 1, 137 SE2nd 333. If a complaint is filed and service is perfected then the date of filing is the date the court acquires jurisdiction. However if service is not perfected, the court never acquires jurisdiction.

The next question to be resolved is: Did the state court have jurisdiction on Dec. 17, 1973, the date the federal suit was filed? If so, the federal court could not acquire pendent jurisdiction of the state claim. However the mere filing of a complaint in state court does not prevent the federal court from acquiring pendent jurisdiction. See Ga. Pac. Corp. v Mendocine County, 340 FS 1061, 357 FS 380 and Whitner v Dows, 410 F2nd 24 p28. By appellee's own admission under oath: (R 32) "Jurisdiction is not proper where service is no proper. Service was perfected improperly." Furthermore appellee was not a proper party to the state suit at this time; he was not the person sued or served. No event occurred between Oct. 17, 1973, the date of the answer, and Dec. 17, 1973, the date the federal suit filed, by which the state court acquired jurisdiction. On Dec. 17, 1973 appellant acted upon the above admission to his injury by filing the federal complaint. (He obtained judgment against appellee in the federal suit which was subsequently set aside based upon the res judicata effect of the state judgment.) Thus appellee, is estopped from asserting that the state court had jurisdiction. See Ga. Code Anno. 38-114. Appellee Howle misrepresented and concelled information of which he had a duty to disclose. Ga. Code Anno. 37-703 explains misrepresentation as follows: "Misrepresentation of a material fact, made wilfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud." Any equity appellee Howle may have acquired by pleading to the

state complaint with reservation as to jurisdiction should yeild to appellant Stephens equity. Ga. Code Anno. 37-109 states: "The equity of a party who has been mislead is superior to that of him who willfully misleads him."

Since the state court did not have jurisdiction on Dec. 17, 1973, the filing date of the federal suit, and the federal court acquired jurisdiction on this date of the state claim; the state court could not subsequently acquire jurisdiction and defeat the redress of appellant's civil rights.

CONCLUSION

Therefore, the judgments in the state suit should be set aside and the case dismissed.

REASONS FOR SUBSTANTIABILITY

In Gooding v Wilson, 405 US 518, 31 LE2nd 408, 92 SCt 1103, a case involving the arrest of a person for abusive language by an Atlanta policeman, this court declared Georgia's abusive language law unconstitutional because it was not construced to limit its application to "fighting words". A few blocks from where the above arrest was made, sometime later, appellant was arrested by an Atlanta policeman because he allegedly used the word "G..d...". If the intellectual deliberations and decisions of this court has no practical effect on the illegal or wrongful activities of a police force and said decision is not respected in the state courts, how can the rule of law prevail unless this court takes jurisdiction and enforces its decisions?

If redress for the violation of appellant's freedom of speach and rights against unreasonable search and seizure granted by the Constitution of the United States is prevented by procedural and legal technicalities amounting to intellectual untruthfulness -the misstatement in the judgment appealed from and the misstatement of the trial judge as shown in Stephens v Howle, 132 Ga. Ap. 92, 207 SE2nd 632 (same case)-what is the purpose of stating constitutional rights in the constitution?

Some legal experts hold the theory: The proper method to redress police misconduct is not the exclusion of evidence and setting aside convictions in criminal cases, but the proper method should be civil suit against the policeman. If appellant's rights in such a suit can effectively be denied because of arbitrary applied procedural rules and legal technicalities, then the above theory is a sham.

Donald H. Stephens

Donald H. Stephens, Appellant

EXHIBIT 1

49894. STEPHENS v. HOWLE.

DEEN, Presiding Judge.

1. Appellant Stephens filed a damage suit based on false imprisonment against L. D. Howle. A verdict was rendered in favor of Howle on the merits of the case. Appellant's first enumeration of error is that the "court erred in not setting aside the judgment and dismissing the case for want of jurisdiction." The record shows that the defendant filed an answer to the complaint on October 13, 1972, one ground of which was that the complaint should be dismissed for lack of jurisdiction over the defendant's person, and another that service of process was insufficient. On October 23, as shown by the record, personal service of process was effectuated. The defendant made no further jurisdictional defense, and it does not lie in the mouth of the plaintiff, after a trial and adverse verdict, to make one now. Further, the defendant testified that he lived in College Park, Georgia, a city which we know to be at least partly in Fulton County. On review, this court will assume the trial court had jurisdiction in the absence of any evidence in the record to the contrary.

2. The second enumeration of error reads: "The court erred in charging the jury: 'The burden of proof is upon plaintiff in this case. . . ' The incorrect defendant assumed the burden of proof by pleading the affirmative defense of justification." However, examination of the record shows that the full sentence given in charge was: "The burden of proof is on the plaintiff in this case to establish directly and proximately what damages, if any, he may have suffered as a result of the acts of which he makes complaint." The objection was merely: "I showed a prima facie case and the burden was on the plaintiff [defendant?] to show I committed a crime." The instruction as given was correct. The plaintiff was not interested in establishing the *defense* of justification, and the instruction did not place any burden on the plaintiff which the law does not already require: That is, if the defendant offered evidence of justification, to rebut such evidence by a preponderance of proof in order to win his case.

3. The remaining enumerations of error are without merit.

Judgment affirmed. Stolz and Marshall, JJ., concur.

ARGUED NOVEMBER 7, 1974 — DECIDED DECEMBER 5, 1974 — REHEARING DENIED DECEMBER 18, 1974 — CERT. APPLIED FOR.

Action for damages. Fulton Superior Court. Before Judge Shaw.

Donald H. Stephens, *pro se*.

Warren W. Wills, Jr., for appellee.

EXHIBIT 2

49376. STEPHENS v. HOWLE.

EVANS, Judge.

This case sounds in tort—false imprisonment, malicious prosecution and libel. Prior to trial, during the discovery phase, defendant, L. D. Howle, served interrogatories upon plaintiff, Donald H. Stephens.

Acting pro se, plaintiff (who was not an attorney at law) answered plaintiff's interrogatories, but defendant contended the answers were evasive, incomplete, semi-illegible, and as to certain questions, amounted to no answer at all. Defendant moved for an order to compel plaintiff to answer, and for sanctions for wilfully failing to properly answer, including attorney fees.

Upon hearing this matter, the trial court ordered that plaintiff "give full and complete *legible* answers to defendant's interrogatories," and that the refusal to make discovery was wilful and without justification; and at a later time the trial court rendered judgment for defendant against plaintiff for $100 attorney fees because of plaintiff's wilful failure to properly answer the defendant's interrogatories.

The sole question for determination here is as to the judgment for $100 attorney fees. *Held:*

1. Where a party moves for an order compelling answers to interrogatories, the court may "if the motion is granted . . . after opportunity for hearing" require the party or his attorney whose conduct necessitated the motion to pay the "reasonable expenses incurred in obtaining the order." Code Ann. § 81A-137 (a 4) (§ 37, CPA; Ga. L. 1966, pp. 609, 650; 1967, pp. 226, 235; 1970, p. 157; 1972, pp. 510, 530).

In *Wilson v. Barrow*, 107 Ga. App. 555 (4) (130 SE2d 812), it was held that the court has a discretion as to the consequences for failure to comply with the provisions of the former discovery Act, Code Ann. Ch. 38-21 (Ga. L. 1959, p. 425 et seq.). Code Ann. § 81A-137 (b 2), supra, as to sanctions, is virtually in the same language as the former law.

3. Defendant contended the answers were illegible, and the trial judge seems to have agreed, in view of the requirement in his order that plaintiff give "full and complete and *legible* answers." It is true that the answers were not typed but were in long-hand. The plaintiff represented himself and was not an attorney at law. We do not find, from a perusal of the answers, that they are illegible. We know of no requirement that they be typed.

4. Defendant served sixty interrogatories upon plaintiff, consisting of a total of approximately 80 questions. In view of defendant's being represented by counsel, and in view of plaintiff being a non-lawyer, and appearing pro se, we can easily understand how these interrogatories, consisting of approximately 80 questions, could have been accounted undue harassment, especially in view of the nature of many of the questions. A party is allowed to show the necessity of *limitation as to the number of interrogatories* served upon him (Moore's Manual, Federal Practice, § 15.04 (4)), but may not make a general objection that they are burdensome. There is little likelihood that the plaintiff knew of his rights in this respect.

5. Plaintiff answered legibly and fully as to most of the questions which the trial court held were not sufficiently full and were illegible. But at least some of the answers were evasive and incomplete. The statute vests a discretion in the trial judge to determine whether the failure to properly answer was wilful, and whether attorney fees should be assessed against the party who fails to properly answer, as well as the amount of such attorney fees.

6. It is most probable that the plaintiff's answers were not purposely or wilfully evasive, but due to a lack of knowledge of the law, ineptness, or lack of conciseness of the nonlawyer plaintiff in responding to defendant's interrogatories. Whether this court would have rendered a judgment for attorney fees in this case or not is immaterial, because the trial court was vested with a discretion, which we do not find to have been abused in this instance.

Judgment affirmed. Pannell, P. J., and Webb, J., concur.

SUBMITTED MAY 10, 1974 — DECIDED JUNE 12, 1974.

Action for damages. Fulton Superior Court. Before Judge Shaw.

Donald H. Stephens, *pro se.*

Barwick, Bentley & Binford, M. Cook Barwick, Thomas S. Bentley, Warren W. Wills, Jr., for appellee.

EXHIBIT 3

COURT OF APPEALS OF GEORGIA
CLERK'S OFFICE

433 State Judicial Building
Atlanta, Georgia 30334

Case No.

49894. D.H. Stephens v. L.D. Howle.

The Motion for Rehearing in the above case was Denied today, **December 18, 1974.**

Morgan Thomas, Clerk
Tel. 656-3450

EXHIBIT 4

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

Atlanta 1/29/75

Dear Sir:

Case No. **29718, Stephens v. Howle**

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours
Mrs. Joline B. Williams, Clerk

EXHIBIT 5

THE COURT OF APPEALS OF GEORGIA

Donald H. Stephens
Appellant

Case No. 49894

v

L. D. Howle
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

The issue of the unconstitutional construction of Ga. Code Anno. 26-2610 (abusive language) and the City of Atlanta's ordinance 20-7 is raised by the judgment of the Court of Appeals entered on Dec. 5, 1974. Appellant's motion for rehearing was denied on Dec. 18, 1974. Appellant's application for certiorari in the Supreme Court of Georgia was denied on Jan. 29, 1975. Appellant has exhausted his remedies in the state courts. THEREFORE:

Notice is hereby given that appellant, Donald H. Stephens, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Georgia entered in this action on Dec. 5, 1974.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Donald H. Stephens, Appellant

R3, Box 18
Sandersville, Ga. 31082

To: Warren W. Wills, Jr.
Attorney for Defendant
640 Equitable Building, Atlanta, Ga. 30303

FILED IN OFFICE
2/13/75
Morgan Thomas by G. M.
CLERK COURT OF APPEALS
OF GEORGIA

AFFIDAVIT OF SERVICE

Donald H. Stephens being duly sworn deposes and says:

That he has this day served counsel for appellee in the foregoing matter with copies of the attached jurisdictional statement by depositing in the United States Mail a copy of same in a properly addressed and sealed envelope with adequate postage thereon and addressed to:

Warren W. Wills, Jr.
640 Equitable Building
100 Peachtree St.
Atlanta, Ga. 30303

This day of 1975.

Appellant Donald H. Stephens
R. 3
Box 18
Sandersville, Ga.

Subscribed and sworn to before me this day of 1975.
31082

Notary Public

BEST COPY AVAILABLE